

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 448

THE UNITED STATES, PLAINTIFF IN ERROR,

VS.

GEORGE F. STEVER, J. B. STEVER, AND HARRY L. BALE,

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF KENTUCKY.

FILED NOVEMBER 23, 1914.

(22420)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 799.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

GEORGE F. STEVER, J. B. STEVER, AND HARRY I. BALL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF KENTUCKY.

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I



a UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

To George F. Stever, J. B. Stever, and Harry I. Ball, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the¹ 26th day of November, 1910, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Kentucky, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John M. Harlan, senior Associate Justice of the United States, this 8th day of November, in the year of our Lord one thousand nine hundred and ten and of the independence of the United States of America the one hundred and thirty-fifth.

[SEAL.]

WALTER EVANS, *Judge.*

b Received the within citation and one copy at Louisville, Ky., November 19, 1910, and executed same in Louisville, Ky., November 19, 1910, on George F. Stevers et al. by delivering a true copy hereof to W. M. Smith, attorney of record for George F. Stevers et al. This November 19, 1910.

Fees, \$2.

G. W. LONG, *U. S. M.,*
By WM. BLADES, *Chief Deputy.*

(Indorsement:) 7496. United States of America *vs.* George F. Stever et al. Citation and copy. George Du Relle, U. S. attorney.

c UNITED STATES OF AMERICA,
Western District of Kentucky,
Sixth Judicial Circuit, ss:

The President of the United States to the honorable Judge of the District Court of the United States for the District of Kentucky, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between the United States of America, plaintiff, against George F. Stever, J. B. Stever, and Harry I. Ball, defendants, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under

¹ Not exceeding 30 days from the day of signing.

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the¹ 26th day of November, 1910, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable John M. Harlan, senior Associate Justice of the United States, the 8th day of November, in the year of our Lord one thousand nine hundred and ten and of the independence of the United States of America the one hundred and thirty-fifth.

A. G. KXOLD,

*Clerk of the District Court of the United States
for the Western District of Kentucky.*

Allowed by

WALTER EVANS, *Judge.*

- 1 Proceedings of the District Court of the United States for the Western District of Kentucky, at a regular term begun and held at the Federal Court Hall, in the City of Louisville, on Monday, October 10th, A. D. 1910.

Present: Honorable Walter Evans, Judge of the United States for said district.

| | |
|-------------------------------------|---|
| UNITED STATES, PLAINTIFF, | } |
| vs. | |
| GEORGE F. STEVER, J. B. STAYER, AND | |
| HARRY I. BALL, DEFENDANTS. | |

Be it remembered that heretofore, to wit, on the 16th day of March, 1910, came the grand jurors of the United States of America, impaneled and sworn and charged to inquire in and for the Western District of Kentucky, and returned into court an indictment against the above-named defendants, which indictment is in words and figures as follows, to wit:

- 2 UNITED STATES OF AMERICA,
Western District of Kentucky, ss:

In the District Court of the United States for the Sixth Judicial Circuit and Western District of Kentucky, held at Louisville, Kentucky, March term, A. D. 1910:

First count. The grand jurors of the United States of America, empaneled and sworn and charged to inquire in and for the Western District of Kentucky, on their oaths present:

That on the twentieth day of April, in the year of our Lord one thousand nine hundred and eight, in the State of Iowa, George F.

¹ Not exceeding 30 days from the day of signing the citation.

Stever, J. B. Stever, and Harry I. Ball had theretofore unlawfully, knowingly, and fraudulently devised a certain scheme for the purpose of obtaining sums of money, the exact amounts of which are to the grand jurors aforesaid unknown, by and under false pretenses from divers persons, to the grand jurors aforesaid unknown, and, among others, from H. G. Fowler and J. K. Fowler, partners doing business under the firm name of H. G. Fowler Brothers, and the said George F. Stever and said J. B. Stever and said Harry I. Ball then and there intended to effect and accomplish said scheme by means of the post-office establishment of the United States by opening correspondence with said persons unknown, and by inciting said persons unknown to open correspondence with said George F. Stever and said J. B. Stever and said Harry I. Ball by means of said post-office establishment, and then and there intended said misuse of said post-office establishment to be a part of said scheme and of the execution thereof, and then and there intended to execute said scheme substantially in the manner following, that is to say:

That said George F. Stever and said J. B. Stever and said Harry I. Ball then and there intended to insert advertisements offering cattle for sale in divers newspapers, and, among others, in a newspaper called the "Pittsburg Live Stock Journal," a further description of which newspaper is to the grand jurors aforesaid unknown, and intended that some of said advertisements should be in substance as follows:

3 "For sale, 234 one, two, and three year old native high-grade and full-blooded dehorned steers. Will sell part or all of either age. Address P. O. Box 125, Fairfield, Iowa,"

and then and there intended that other advertisements so, as aforesaid, intended to be inserted in other newspapers, should be of a similar character, and said George F. Stever and said J. B. Stever and said Harry I. Ball then and there intended by means of said advertisements and similar advertisements to incite said persons unknown to open correspondence with the said George F. Stever and said J. B. Stever and said Harry I. Ball by means of the post-office establishment of the United States, and to send in answer to said persons so opening such correspondence, and to each of them, by means of said post-office establishment, letters falsely and fraudulently representing that the cattle so, as aforesaid, advertised and offered for sale by the said George F. Stever and said J. B. Stever and said Harry I. Ball were of greater weight and of better quality than said cattle really were, and that said cattle were free from disease, and that said cattle were straight steers, and further intended then and there, by means of said letters so, as aforesaid, sent to said persons unknown, to induce said persons unknown to come from their respective places of residence to Fairfield, Iowa, and then and there intended to falsely and fraudulently deceive said persons unknown, and each of them, and to induce said persons unknown, and each of them, to purchase cattle from them, the said George F. Stever and said J. B. Stever and said Harry I. Ball, and to misrepresent to said persons unknown,

and to each of them, the weight, quality, and value of said cattle, and thereby to induce said persons, and each of them, to buy quantities of said cattle, the exact quantities whereof are to the grand jurors aforesaid unknown, and to substitute other and different and inferior cattle for the cattle so, as aforesaid, sold to said persons unknown, and each of them, and to represent to said persons unknown, and each of them, that the cattle so substituted were the same cattle so, as aforesaid, bought by said persons unknown, and each of them, and thereby to deceive said persons unknown, and by each of them, and knowingly and fraudulently to obtain from said persons unknown, and from each of

4 them, large sums of lawful money of the United States, the amounts whereof are to the grand jurors aforesaid unknown, by and under and by means of said false pretenses as to the weight and quality and value and identity and freedom from disease of said cattle so, as aforesaid, intended to be sold to said persons unknown, and each of them. And the said George F. Stever and said J. B. Stever and said Harry I. Ball, by means of said advertisements, then and there incited said H. G. Fowler and said J. K. Fowler, then and there partners doing business under the firm name of H. G. Fowler Brothers, to open correspondence with them, the said George F. Stever and said J. B. Stever and said Harry I. Ball, and the said H. G. Fowler and said J. K. Fowler then and there opened such correspondence by then and there depositing in the mail of the United States at Colesburg, Kentucky, a certain letter then and there bearing an address in substance as follows:

“ P. O. Box 125,

“ Fairfield, Iowa,”

and a further description of which said letter is to the grand jurors aforesaid unknown.

And in answer to said letter so, as aforesaid, deposited by said H. G. Fowler and said J. K. Fowler, and in and for the execution of said scheme so, as aforesaid, devised for the purpose of obtaining money under false pretenses, and in furtherance of said scheme, said George F. Stever and said J. B. Stever and said Harry I. Ball, on the twentieth day of April, in the year of our Lord one thousand nine hundred and eight, unlawfully did knowingly and fraudulently deposit and cause to be deposited in the mail of the United States at Fairfield, Iowa, and did then and there knowingly cause to be sent by said mail of the United States a certain letter to be conveyed and delivered by said mail of the United States at Colesburg, in the State of Kentucky, and in the western district thereof, a certain letter then and there enclosed in an envelope, which said envelope then and there bore an address of the tenor following, to wit:

“ H. G. Fowler Bros.,
Colesburg, Ky.”

5 and which said letter was then and there carried by mail to said Colesburg, in said western district of Kentucky, for delivery at said Colesburg according to said direction thereon, and was then

and there, at Colesburg aforesaid, by said George F. Stever and said J. B. Stever and said Harry I. Ball, caused to be delivered by mail to said persons to whom said letter was then and there addressed, to wit, to said H. G. Fowler and said J. K. Fowler, partners as aforesaid, and which said letter was then and there in substance as follows, to wit:

GEO. F. STEVER,

FAIRFIELD, IOWA, *April 20th, 1908.*

H. G. FOWLER BROS.,
K. Y.

| | | | | | | | | |
|--------|-----|------------|-------|------|--------|--------|---------|---------|
| I have | 132 | will weigh | about | 600 | I want | around | \$22.00 | a head. |
| " " | 96 | " " | " " | 750 | " " | " " | 27.00 | " " |
| " " | 91 | " " | " " | 900 | " " | " " | 34.00 | " " |
| " " | 78 | " " | " " | 1080 | " " | " " | 40.00 | " " |

I have no scales but should we conclude to weigh I suppose I ought to have around 3 $\frac{1}{2}$ owing to how many, which ones & the shrink and so on. These cattle are all high grade & full bloods, natives, Reds & Roans, dehorned Each bunch Very even in size and will suit any man that is a Judge and wants stuff for his own use. I want to sell a part of these cattle at once as I need the money by the 1st of May, if you need any good cattle come at once & I will try as hard to sell as you will to buy the Freight to your place on stock cattle as near as I can figure it will cost you about \$25.54 a car, Should you come be sure & wire me day before at my expense & I will be sure to be at home and meet you at train with buggy (Some time I am over at the other Farm for a day or so at a time but if you wire me I can be at home as well as not.

Resp yours,

GEORGE F. STEVER.

P. S. My Neighbor has a Very nice lot of white face steers from Short horn Durham Cows they are Very nice and he is anxious to sell So if we did not trade I am sure you can trade with Him if you want Something nice or it might you could use them all

As Ever yours

G. F. S.

and a further description of which said letter is to the grand jurors aforesaid unknown.

Against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided.

U. S. R. S., sect. 3894.

P. L. & R., sect. 499.

5 F. S. A., sect. 846.

f Nm 500, or I nm ly or b.

6 Second count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on the twentieth day of April, in the year of our Lord one thousand nine hundred and eight, in the State of Iowa, said George F. Stever and said J. B. Stever and said Harry I. Ball feloniously did conspire, combine, and confederate together with each other and with divers persons to the grand jurors aforesaid unknown, to com-

mit an offense against the United States, to wit, the offense of knowingly depositing and causing to be deposited in the mail of the United States at Fairfield, Iowa, and causing to be sent by said mail of the United States, to be conveyed and delivered by said mail of the United States at Colesburg, in the State of Kentucky, and in the western district thereof, a certain letter concerning a certain scheme devised for the purpose of obtaining money under false pretenses and of knowingly causing said letter to be delivered by mail of said United States at said Colesburg, to the persons to whom said letter was then and there addressed in the manner following, to wit:

That on the twentieth day of April, in the year of our Lord one thousand nine hundred and eight, said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to said grand jurors aforesaid unknown, had theretofore unlawfully, knowingly, and fraudulently devised a certain scheme for the purpose of obtaining sums of money, the exact amounts of which are to the grand jurors aforesaid unknown, and under false pretenses from divers persons to the grand jurors aforesaid unknown, and, among others, from H. G. Fowler and J. K. Fowler, partners doing business under the firm name of H. G. Fowler Brothers, and the said George F. Stever and the said J. B. Stever and said Harry I. Ball and said others to the grand jurors aforesaid unknown, then and there intended to effect and accomplish said scheme by means of the Post Office Establishment of the United States by opening correspondence with said persons unknown, and by inciting said persons unknown to open correspondence with said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to the grand jurors aforesaid unknown, by means of said Post Office Establishment, and then and there intended said misuse of said Post Office Establishment to be a part of said scheme and of the execution thereof, and then and there intended to execute said scheme substantially in the manner following, that is to say:

That the said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to the grand jurors aforesaid unknown then and there intended to insert advertisements offering cattle for sale in divers newspapers, and, among others, in a newspaper called the "Pittsburg Live Stock Journal," a further description of which newspaper is to the grand jurors aforesaid unknown, and intended that some of said advertisements should be in substance as follows:

"For sale, 234 one, two, and three year old native high-grade and full-blooded dehorned steers. Will sell part or all of either age. Address P. O. Box 125, Fairfield, Iowa."

and then and there intended that other advertisements so as aforesaid intended to be inserted in other newspapers should be of a similar character, and the said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to the grand jurors aforesaid unknown then and there intended, by means of said advertisements and similar advertisements, to incite said persons unknown to open correspondence with the said George F. Stever and said J. B. Stever

and the said Harry I. Ball and said others to the grand jurors aforesaid unknown, by means of the post-office establishment of the United States, and to send in answer to said persons so opening such correspondence, and to each of them, by means of said post-office establishment, letters falsely and fraudulently representing that the cattle so, as aforesaid, advertised, and offered for sale by the said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to the grand jurors aforesaid unknown, were of greater weight and of better quality than said cattle really were, and that said cattle were free from disease, and that said cattle were straight steers, and further intended then and there by means of said letters so, as aforesaid, sent to said persons unknown, to induce said persons unknown to come from their respective places of residence to Fairfield, Iowa, and then and there intended to falsely and fraudulently deceive said persons unknown, and each of them, and to induce said persons unknown, and each of them, to purchase cattle from them, the said George F. Stever and said J. B. Stever and said Harry I. Ball, and said others to the grand jurors aforesaid unknown, and to misrepresent to said persons unknown, and to each of them, the weight, quality, and value of said cattle and thereby to induce said persons, and each of them, to buy quantities of said cattle, the exact quantities whereof are to the grand jurors aforesaid unknown, and to substitute other and different and inferior cattle for the cattle so, as aforesaid, sold to said persons unknown, and each of them, and to represent said persons unknown, and each of them, that the cattle so substituted were the same cattle so, as aforesaid, bought by said persons unknown, and each of them, and thereby to deceive said persons unknown, and each of them, and knowingly and fraudulently to obtain from said persons unknown, and from each of them, large sums of lawful money of the United States, the amounts whereof are to the grand jurors aforesaid unknown, by and under and by means of said false pretenses as to the weight and quality and value and identity and freedom from disease of said cattle so, as aforesaid, intended to be sold to said persons unknown, and each of them. And the said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to said grand jurors aforesaid unknown, by means of said advertisements, then and there incited said H. G. Fowler and said J. K. Fowler, then and there partners doing business under the firm name of H. G. Fowler Brothers, to open correspondence with them, the said George F. Stever and said J. B. Stever and said Harry I. Ball and said others to said grand jurors aforesaid unknown, and the said H. G. Fowler and said J. K. Fowler then and there opened such correspondence by then and there depositing in the mail of the United States at Colesburg, Kentucky, a certain letter then and there bearing an address in substance as follows:

" P. O. Box 125,
Fairfield, Iowa,"

and a further description of which said letter is to the grand jurors aforesaid unknown.

And in answer to said letter so, as aforesaid deposited by
 9 said H. G. Fowler and said J. K. Fowler, and in and for the
 execution of said scheme so, as aforesaid, devised for the pur-
 pose of obtaining money under false pretenses, and in furtherance of
 said scheme said George F. Stever did an act to affect the object of
 said conspiracy, that is to say that the said George F. Stever and said
 J. B. Stever and said Harry I. Ball and said others to said grand
 jurors aforesaid unknown, on the twentieth day of April, in the year
 of our Lord one thousand nine hundred and eight, unlawfully did
 knowingly and fraudulently deposit and cause to be deposited in the
 mail of the United States at Fairfield, Iowa, and did then and there
 knowingly cause to be sent by said mail of the United States a certain
 letter to be conveyed and delivered by said mail of the United States
 at Colesburg, in the State of Kentucky, and in the western district
 thereof, a certain letter then and there enclosed in an envelope, which
 said envelope then and there bore an address of the tenor following,
 to wit:

“ H. G. Fowler Bros.,
 Colesburg, Ky.”

and which said letter was then and there carried by mail to said
 Colesburg in said western district of Kentucky for delivery at said
 Colesburg according to said direction thereon, and was then and
 there, at Colesburg aforesaid, by said George F. Stever and said J. B.
 Stever and said Harry I. Ball and said others to the grand jurors
 aforesaid unknown, caused to be delivered by mail to said persons to
 whom said letter was then and there addressed, to wit, to said H. G.
 Fowler and said J. K. Fowler, partners as aforesaid, and which said
 letter was then and there in substance as follows, to wit:

GEO. F. STEVER,

FAIRFIELD, IOWA, *April 20, 1908.*

H. G. FOWLER BROS.,
 K. Y.

| | |
|-----------------------------|-----------------------------------|
| I have 132 will weigh about | 600 I want around \$22.00 a head. |
| “ “ 96 “ “ “ | 750 “ “ “ 27.00 “ “ |
| “ “ 91 “ “ “ | 900 “ “ “ 34.00 “ “ |
| “ “ 78 “ “ “ | 1,080 “ “ “ 40.00 “ “ |

I have no scales, but should we conclude to weigh I suppose I ought
 to have around 3 $\frac{1}{2}$ owing to how many which ones & the shrink and
 so on. These cattle are all high grade & full bloods, natives,
 10 Red & Roans dehorned. Each bunch Very even in size and will
 Suit any man that is a Judge and wants stuff for his own use. I
 want to sell a Part of thes cattle at once as I neet the money by the 1st of
 May, if you need any good cattle come at once & I will try as hard to
 sell as you will to buy the Freight to your place on stock cattle as near
 as I can figure it will cost you about \$25.54 a car, Should you come
 be sur & Wire me day before at my expense & I will be sure to be at

home and meet you at train with buggy (Some time I am over at the other Farm for a day or so at a time but if you wire me I can be at home as well as not

Resp yours

GEORGE F. STEVER

P. S. My Neighbor has a Very nice lot of white face steers from Short horn Durham Cows they are Very nice and he is anxious to sell So if we did not trade I am sure you can trad with Him if you want Something nice or it might you could use them all

As Evr yours

G. F. S.

and a further description of which said letter is to the grand jurors aforesaid unknown.

Against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

U. S., sect. 5440.

U. S. R. S., sect. 3894.

P. L. & R., sect. 499.

5 F. S. A., sect. 846.

2 F. S. A., 247.

f nm \$10,000 or I nm 2y or b.

GEORGE DURELLE,

U. S. ATTORNEY,

Western District of Kentucky.

Witnesses:

J. K. Fowler, Boston, Ky.

J. W. Welborn, P. O. inspector, Ottumwa, Ia.

B. S. Mattingly, Bourbon Stock Yards, Louisville, Ky.

Thomas Hillert, " " " " "

11 D. J. Russell, Bourbon Stock Yards, Louisville, Ky.

Charles R. Pinkney, Fairmount, North Dakota.

Thomas E. Read, Elizabeth, Illinois.

D. F. Sullivan, Rockford, Ills.

W. G. Ross, P. M., Fairfield, Ia.

And on another day of said term of said court, continued and held, to wit, on October 5th, 1910, the following proceedings were had:

UNITED STATES

vs.

GEORGE F. STEVER ET AL.

} 7496.

This day came the district attorney. Came also the defendants by W. M. Smith, their attorney, and filed a demurrer to the indictment herein. It is ordered that said demurrer be set for hearing October 6th, 1910.

The demurrer above referred to is as follows:

In the District Court of the United States for the Western District of Kentucky.

| | | |
|--------------------------------------|---|-----------|
| UNITED STATES, PLAINTIFF, | } | Demurrer. |
| <i>vs.</i> | | |
| GEORGE F. STEVER ET AL., DEFENDANTS. | | |

Comes defendants, George F. Stever, J. B. Stever, and Harry I. Ball, by their attorney, W. M. Smith, and they, and each of them, enter a general demurrer to the first count of the indictment herein.

1. Because they say that the allegations and charges contained in said first count are not sufficient to show that any offense, under section 3394 of the Compiled Statutes of the United States has been committed by defendants, or any of them, against the United States.

2. Because they say that the allegations and charges contained in said first count are not sufficient to show that any offense against the laws of the United States has been committed by said defendants, or any of them.

3. Because they say that the allegations and charges contained in said first count are not sufficient to show that any offense against the laws of the United States has been committed by said defendants, or any of them, within the jurisdiction of this court.

13 4. Because they say that so much of said section 3394 of the Compiled Statutes of the United States which authorizes the prosecution of the offense named therein,

“either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery, according to the directions thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed”

is unconstitutional and void, because same is in violation of defendants' rights under Article III, subsection 3 of the Constitution of the United States and the sixth amendment thereto.

5. Because they say said indictment does not charge that defendants, or any of them, knowingly caused to be delivered said letter mentioned therein.

6. Because they say that said count is bad on account of duplicity or multifariousness.

7. Defendants, and each of them, by their attorney, W. M. Smith, enter a general demurrer to the second count of the indictment herein because they say that the allegations and charges made in said second count are not sufficient to show that any offense against the laws of the United States has been committed by said defendants, or any of them.

8. Because they say that the allegations and charges made in said second count are not sufficient to show that any offense against the

laws of the United States has been committed by defendants, or any of them, within the jurisdiction of this court.

9. Because they say that said count is bad on account of duplicity or multifariousness.

14 10. Defendants enter a general demurrer to the jurisdiction of this court to try said charges, or any of them, made in said indictment, or in either count thereof, because they say that neither said indictment as a whole, nor either count thereof, charge an offense against the laws of the United States committed by defendants, or any of them, within the jurisdiction of this court.

W. M. SMITH, *Atty. for Defts.*

And on another day of said term of said court, continued and held on October 6th, 1910, the following proceedings were had:

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|--------------------------------------|---------|
| UNITED STATES, PLAINTIFF, | } 7496. |
| <i>vs.</i> | |
| GEORGE F. STEVER ET AL., DEFENDANTS. | |

This day came the district attorney. Came also the defendants by W. M. Smith, their attorney. This cause coming on to be heard upon the defendants' demurrer to the indictment herein, and having been argued by counsel, and the court not being fully advised thereof, takes time.

And at another term of our said court, held for its October term, 1910, continued and held, to wit, on October 10th, 1910, the following proceedings were had:

United States District Court, for the Western District of Kentucky.

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| THE UNITED STATES OF AMERICA, | } Judgment. |
| <i>vs.</i> | |
| GEORGE F. STEVER, J. B. STEVER, AND HARRY I. BALL. | |

15 The court being now sufficiently advised of the questions arising upon the demurrers of the defendants to the indictment, and each separate count therein contained, delivered an opinion in writing, which is filed; and, pursuant thereto, it is considered by the court that the proper construction of the statutes of the United States, and particularly of sections 3894, 5480, 5440, and 731 thereof, requires the court to hold, and upon that ground the court does hold and adjudge, that neither of the counts contained in the indictment states an offense against the United States cognizable in this court, or of which it properly has jurisdiction; and so construing the statutes of the United States, it is considered and adjudged by the court that the indictment and each separate count thereof is insufficient; the demurrers thereto are sustained, and the indictment will, for that reason, be, and it is, quashed and set aside. To each and

every of these rulings of the court the United States of America excepts.

The opinion above referred to is as follows:

United States District Court, Western District of Kentucky.

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|------------------------------|------------|
| UNITED STATES | } Opinion. |
| <i>vs.</i> | |
| GEORGE F. STEVER AND OTHERS. | |

The demurrers to the indictment involve the consideration and construction of several sections of the Revised Statutes of the United States, namely:

“Section 3894. No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket, tickets, or part thereof, or of any share, or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter
16 carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried on the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

“Section 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or

of any State, Territory, municipality, company, corporation or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post Office Establishment of the United States, or by inciting such other person, or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet, or advertisement in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said Post Office Establishment, or shall take or receive any such therefrom, such person so misusing the Post Office Establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post Office Establishment enters as an instrument into such fraudulent scheme and device."

And section 731. "When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

It is quite true, as argued by the learned district attorney, that it is not necessary for a count to show upon its face that it is based upon any particular section of the laws of the United States.

17 If any provision of those laws supports an indictment, it is quite sufficient. But a mere blending of averments, based upon clauses which may be found in various statutory provisions, will not make a count in an indictment sufficient, unless those averments can be fairly held to bring the case within the law.

We will first consider the objections to the first count:

Judge Severens, when district judge, had occasion, in the case of *United States vs. Sauer*, 88 Fed., 249, to construe the sections we have copied. We feel bound to accept his ruling, and when we do so, it seems clear that the provisions of section 3894 cannot aid the first count. That section, as construed by the learned judge, cannot be

made applicable to a case like this. His view was, that the section relates to other and very different subjects, viz, lotteries and lottery schemes, and must be limited to them, leaving section 5480 to operate upon indictments like this, which charges the use of the mails of the United States to effectuate a scheme to defraud. It is indeed difficult, when reading the count, to see how anything but the provisions of section 5480 were in the mind of the pleader when drawing the indictment. However, he did insert an averment as to a scheme to "obtain money and property under false pretenses" in the language of section 3894, but we think that a fair construction of this averment might be, that it was intended thereby to give a better description of the scheme to defraud, which was to be carried into effect by the use of the Post Office Department, and a possible object may also have been to get the benefit of the last clause of section 3894, which gives jurisdiction either in Iowa, where the letter was mailed, or in Kentucky, where it was delivered.

In construing the statutes we have reached the conclusion that the first count can be based only on section 5480, and if this be correct, then the offense charged was committed in Iowa, and not in Kentucky. In Iowa the scheme to defraud was devised, and there the letter designed to effectuate it was placed in the post office. These things were all that were necessary to complete the offense under section 5480. It was not necessary to aver, nor would it be necessary to prove, that the letter was carried to or delivered in Kentucky. Depositing it in the mail completed the offense in Iowa.

2. Furthermore, we think that if the first count of the indictment is susceptible of being regarded as founded both upon section 3894 and upon section 5480, then, necessarily, two separate and distinct offenses are charged in the count, and the demurrer thereto, based upon the ground of duplicity, would be available to reach that difficulty.

United States vs. Dietrich, 126 Fed., 664.

United States vs. Cadwallader, 59 Fed., 679.

United States vs. Davis, 33 Fed., 621.

However, for the reasons stated, we think only one offense is charged in the count, and that that offense was committed, if at all, outside of this district and outside of the jurisdiction of this court.

3. As to the second count, the case seems obvious. It is based upon section 5440 of the Revised Statutes, which is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

The count alleges that the conspiracy to violate the laws of the United States was entered into in the State of Iowa, and that one of the conspirators then and there, viz, at Fairfield, in that State, in order to carry the conspiracy into effect, deposited in the mails of the United States the letter described in the count. We cannot doubt that these averments show that the offense was completed in Iowa, and consequently that we cannot have jurisdiction of it here.

Nor does section 731 of the Revised Statutes help the matter, because the entire offense, which was not a continuing one, was committed in Iowa, and nothing was needed to be done in Kentucky to complete it, although possibly the fruits of the fraud may have been reaped in Kentucky, or from one of her citizens.

Construing the sections of the statute as we have indicated leads to the conclusion that the demurrers of the defendants to each count in the indictment must be sustained, and a judgment accordingly, and quashing and setting aside the indictment will be entered.

WALTER EVANS, *Judge*.

OCTOBER 10, 1910.

And on another day of said term of said court, continued and held, to wit, on November 8th, 1910.

This day came the United States of America, plaintiff herein, by George DuRelle, United States attorney, and filed its petition for writ of error and assignment of errors herein, and, upon consideration thereof, it is considered and adjudged by the court that a writ of error be allowed to the Supreme Court of the United States.

The petition for writ of error and assignment of errors, above referred to, is as follows:

United States of America, Western District of Kentucky, at Louisville.

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| UNITED STATES OF AMERICA, | } No. 7496. Petition for writ of error. |
| <i>vs.</i> | |
| GEORGE F. STEVER, J. B. STEVER, and Harry I. Ball. | |

And now comes the United States of America, plaintiff herein, by George DuRelle, attorney of the United States, and says that on the 10th day of October, A. D. 1910, this court entered judgment herein in favor of said defendants against said plaintiff, and entered a decision and judgment sustaining a demurrer to the indictment and quashing said indictment, which said decision and judgment was and is based upon the construction of the statutes upon which said indictment was founded, to wit, sections 5440, 731, 3894, and 5480 of the Revised Statutes of the United States, in which decision and judgment and proceedings certain errors were committed to the prejudice of said United States, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore said United States prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States.

GEORGE DURELLE,
Attorney for Plaintiff in Error.

United States of America, Western District of Kentucky, at Louisville.

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| UNITED STATES OF AMERICA, PLAINTIFF, | } No. 7496. Assignment of errors. |
| <i>vs.</i> | |
| GEORGE F. STEVER, J. B. STEVER, and Harry I. Ball, defendants. | |

Afterwards, to wit, on the 8th day of November, A. D. 1910, comes the United States of America, plaintiff in error, by George DuRelle, attorney of the United States, and says that in the record of the proceedings in the above-entitled cause in the United States District Court for the Sixth Circuit and Western District of Kentucky, there is manifest error in this, to wit:

I. In deciding and adjudging that the proper construction of the statutes of the United States, and particularly of sections 3894, 5480, 5440, and 731 of the Revised Statutes of the United States, requires the court to hold, and upon that ground, in holding
21 and deciding and adjudging that neither of the counts contained in the indictment herein states an offense against the United States cognizable in the District Court of the United States for the Western District of Kentucky, or of which said court properly has jurisdiction.

II. In deciding and adjudging that neither of the counts contained in the indictment states an offense against the United States cognizable in the District Court of the United States for the Western District of Kentucky, or of which said court properly has jurisdiction under a proper construction of the statutes of the United States, and particularly of sections 3894, 5480, 5440, and 731 of the Revised Statutes of the United States.

III. In deciding and adjudging that the indictment herein, and each separate count thereof, is insufficient, which decision and judgment is based upon the construction of the statutes of the United States, upon which said indictment is founded, to wit, sections 3894, 5480, 5440, and 731 of the Revised Statutes of the United States.

IV. In deciding and adjudging that the demurrers to the indictment, and to each separate count thereof, are sustained, which decision and judgment is based upon the construction of the statutes of the United States, upon which said indictment is founded, to wit, sections 3894, 5480, 5440, and 731 of the Revised Statutes of the United States.

V. In deciding and adjudging that the indictment herein be quashed and set aside, which decision and judgment is based upon

the construction of the statutes of the United States, upon which said indictment is founded, to wit, sections 3894, 5480, 5440, and 731 of the Revised Statutes of the United States.

GEORGE DURELLE,
*Attorney of the United States for the
Western District of Kentucky.*

21 UNITED STATES OF AMERICA,
Western District of Kentucky.

I, A. G. Ronald, clerk of the District Court of United States, Western District of Kentucky, at Louisville, Kentucky, do hereby certify that the foregoing 20 pages contain a true and correct transcript of the record and proceedings had in the case of United States of America against George F. Stever, J. B. Stever, and Harry I. Ball, No. 7496, as the same appears from the files and records in my said office.

Witness my hand and seal of said court at Louisville, this 21st day of November, A. D. 1910.

[SEAL.]

A. G. RONALD, *Clerk.*
By HENRY F. CASSIN, D. C.

(Indorsement on cover:) File No. 22420, W. Kentucky, D. C. U. S. Term No. 799. The United States, plaintiff in error, vs. George F. Stever, J. B. Stever, and Harry I. Ball. Filed November 28th, 1910. File No. 22420.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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| THE UNITED STATES, PLAINTIFF IN ERROR, | } | No. 799. |
| <i>v.</i> | | |
| GEORGE F. STEVER, J. B. STEVER, AND | | |
| HARRY I. BALL. | | |

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF KENTUCKY.*

MOTION TO ADVANCE.

Comes now the Solicitor General and moves the court to advance this case and assign it for hearing during the next term.

This writ of error was sued out under the Criminal Appeals Act of March 2, 1907 (34 Stat., 1246), from a judgment of the district court sustaining a demurrer to the indictment against the defendants, such decision being based upon "the construction of the statute upon which the indictment is founded."

The indictment was based on section 3894 of the Revised Statutes, as amended (2 Comp. Stat., U. S., 2659). The first count, which is the only one that need be noticed on this motion, charged the de-

fendants with having, in the State of Iowa, devised a scheme for obtaining money under false pretenses, and in furtherance thereof with having caused a certain letter to be deposited in the mail and delivered in the western district of Kentucky. The particular scheme referred to, it was alleged, consisted in the defendants making false representations as to the character and quality of certain cattle which they offered for sale and in inducing their correspondents to purchase inferior cattle.

The court held that section 3894 was confined to lotteries and lottery schemes, and that the language therein "or concerning schemes devised for the purpose of obtaining money or property under false pretenses," would not cover a case of the character described in the indictment.

As this is a criminal case, and as the Criminal Appeals Act requires that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases," this motion to advance is respectfully submitted.

FREDERICK W. LEHMANN,
Solicitor General.

APRIL, 1911.

13
FILED.

SEP 22 1911

JAMES H. McKENNEY,

CLERK.

~~NO. 448.~~

Supreme Court of the United States

No. 448.

THE UNITED STATES,

PLAINTIFF IN ERROR,

VS.

GEORGE F. STEVER, J. B. STEVER
AND HARRY I. BALL,

DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS.

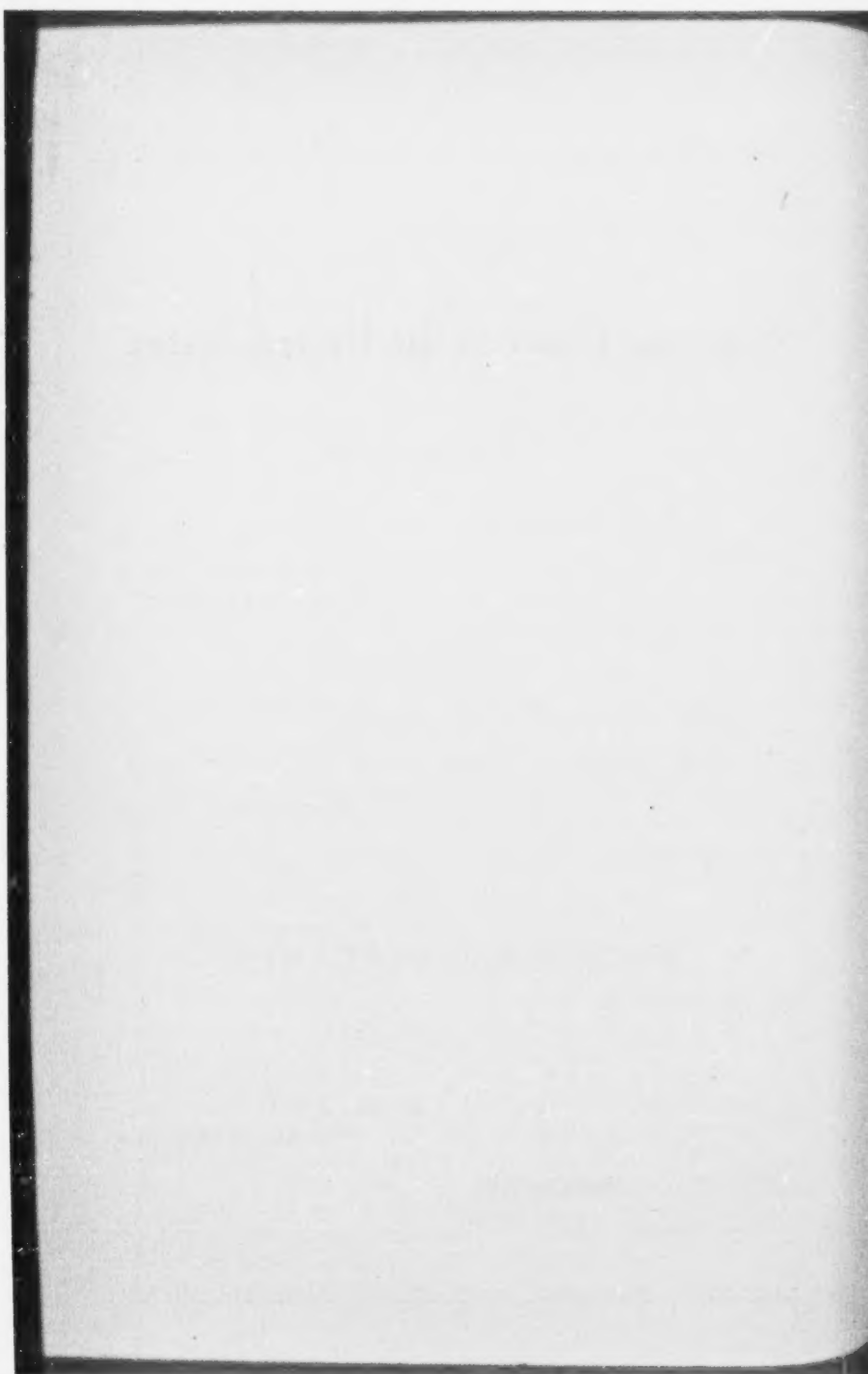
W. M. SMITH,

Attorney for Defendants.

LEGGETT and

McKenney

Of Counsel.



No. 799.

Supreme Court of the United States

THE UNITED STATES,

Plaintiff in Error.

vs.

GEORGE F. STEVER, J. B. STEVER

AND HARRY I. BALL,

Defendants in Error.

BRIEF FOR DEFENDANTS ON DEMURRER.

The statutes of the United States, under which this indictment is sought to be maintained, are as follows:

"Section 3894. No letter, postal card, or circular concerning any lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order, for the purchase of any ticket, tickets, or part thereof, or of any share, or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enter-

prise, whether said list is of any part or of all of the drawing, be carried on the mail or delivered by any postmaster or letter carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, or by both fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

"Section 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States, or of any state, territory, municipality, company, corporation or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post office establish-

ment of the United States, or by inciting such other person, or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet, or advertisement in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device."

And Section 731. "When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

ANALYSIS OF COUNTS.

This indictment contains two counts, the first count, charges that on the 20th day of April, 1908, in the state of Iowa, George F. Stever, J. B. Stever and Harry I. Ball, had theretofore, unlawfully, knowingly and fraudulently devised a certain scheme for the purpose of obtaining sums of money, by and under false pretenses, from divers persons to the grand jury unknown, and from H. G. Fowler and J. K. Fowler, partners doing business under

the firm name of H. G. Fowler Brothers. That defendants intended to effect said scheme by opening correspondence through the post office establishment of the United States, with said unknown parties, and inciting said parties to correspond with defendants, and intended this use of the post office as part of said scheme.

SCHEME DEVISED.

The scheme devised is then described in said count as follows:

"That said George F. Stever and said J. B. Stever and said Harry I. Ball then and there intended to insert advertisements offering cattle for sale in divers newspapers, and, among others, in a newspaper called the 'Pittsburg Live Stock Journal,' a further description of which newspaper is to the grand jurors aforesaid unknown, and intended that some of said advertisements should be in substance as follows:

'For sale, 234 one, two and three year old native high grade and full blooded dehorned steers. Will sell part or all of either age. Address P. O. Box 125, Fairfield, Iowa.'

and then and there intended that other advertisements so, as aforesaid, intended to be inserted in other newspapers, should be of a similar character, and said George F. Stever and said J. B. Stever and said Harry I. Ball then and there intended by means of said advertisements and similar advertisements to incite said persons unknown to open correspondence with the said George F. Stever and said J. B. Stever and said Harry I. Ball by means of the post office establishment of the United States, and to send in answer to said persons so opening such correspondence, and to each of them, by means of said post office establishment, letters falsely and fraudulently

representing that the cattle so, as aforesaid, advertised and offered for sale by the said George F. Stever and said J. B. Stever and said Harry I. Ball were of greater weight and of better quality than said cattle really were, and that said cattle were free from disease, and that said cattle were straight steers, and further intended then and there, by means of said letters so, as aforesaid, sent to said persons unknown, to induce said persons unknown to come from their respective places of residence to Fairfield, Iowa, and then and there intended to falsely and fraudulently deceive said persons unknown, and each of them, and to induce said persons unknown, and each of them, to purchase cattle from them, the said George F. Stever and said J. B. Stever and said Harry I. Ball and to misrepresent to said persons unknown, and to each of them, the weight, quality, and value of said cattle, and thereby to induce said persons, and each of them, to buy quantities of said cattle, the exact quantities whereof are to the grand jurors aforesaid unknown, and to substitute other and different and inferior cattle for the cattle so, as aforesaid, sold to said persons unknown, and each of them, and to represent to said persons unknown, and each of them, that the cattle so substituted were the same cattle so, as aforesaid, bought by said persons unknown, and each of them, and thereby to deceive said persons unknown, and by each of them, and knowingly and fraudulently to obtain from said persons unknown, and from each of them, large sums of lawful money of the United States, the amounts whereof are to the grand jurors aforesaid unknown, by and under and by means of said false pretenses as to the weight and quality and value and identity and freedom from disease of said cattle so, as aforesaid, intended to be sold to said persons unknown, and each of them." Record, pages 3 and 4.

It is then charged that defendants, by means of advertising, incited H. G. Fowler Brothers to open correspondence with the defendants, by mailing a letter at

Colesburg, Kentucky, addressed to "P. O. Box 125, Fairfield, Iowa."

That on April the 20th, 1908, defendants in answer to said letter and in execution of said scheme to obtain money under false pretenses,

"unlawfully did knowingly and fraudulently deposit and cause to be deposited in the mail of the United States at Fairfield, Iowa, and did then and there knowingly cause to be sent by said mail of the United States a certain letter to be conveyed and delivered by said mail of the United States at Colesburg, in the state of Kentucky, and in the Western District thereof, a certain letter then and there enclosed in an envelope which said envelope then and there bore an address of the tenor following, to-wit:

'H. G. Fowler Bros.,
Colesburg, Ky.'

and which letter was then and there carried by mail to said Colesburg in said Western District of Kentucky for delivery at said Colesburg according to said direction thereon, and was then and there, at Colesburg aforesaid, by said George F. Stever and said J. B. Stever and said Harry I. Ball, caused to be delivered by mail to said persons to whom said letter was then and there addressed, to-wit, to said H. G. Fowler and said J. K. Fowler, partners as aforesaid, and which said letter was then and there in substance as follows, to-wit:

Geo. F. Stever,
Fairfield, Iowa, April 20th, 1908.
H. G. Fowler Bros.,
K. Y.

I have 132 will weigh about 600, I want around \$22.00 a head.

I have 96 will weigh about 750, I want around \$27.00 a head.

I have 91 will weigh about 900, I want around \$34.00 a head.

I have 78 will weigh about 1080, I want around \$40.00 a head.

I have no scales but should we conclude to weigh I suppose I ought to have around 3 3-4 owing to how many, which ones & the shrink and so on. These cattle are all high grade & full bloods, natives, reds and roans, dehorned. Each bunch Very even in size and will Suit any man that is a Judge and wants stuff for his own use. I want to sell a part of these cattle at once as I need the money by the 1st of May, if you need any good cattle come at once & I will try as hard to sell as you will to buy. The Freight to your place on stock cattle as near as I can figure it will cost you about \$25.54 a car. Should you come be sure & wire me day before at my expense & I will be sure to be at home and meet you at train with buggy. Some time I am over at the other farm for a day or so at a time but if you wire me I can be at home as well as not.

Resp. yours,

George F. Stever.

P. S.—My neighbor has a Very nice lot of white face steers from short horn Durham cows, they are very nice and he is anxious to sell. So if we did not trade I am sure you can trade with him if you want Something nice or it might you could use them all.

As Evr yours,

G. F. S."

ARGUMENT AND AUTHORITIES CITED.

In passing upon this demurrer, Judge Evans, District Judge, in his opinion rendered, said:

"We will first consider the objections to the first count:

Judge Severens, when district judge, had occasion in the case of United States vs. Sauer, 88 Fed. 249, to construe the sections we have copied. We feel bound to accept his ruling, and when we do so, it

seems clear that the provisions of section 3894 cannot aid the first count. That section, as construed by the learned judge, cannot be made applicable to a case like this. His view was, that the section relates to other and very different subjects, viz., lotteries and lottery schemes, and must be limited to them, leaving section 5480 to operate upon indictments like this, which charges the use of the mails of the United States to effectuate a scheme to defraud. It is indeed difficult, when reading the count, to see how anything but the provisions of section 5480 were in the mind of the pleader when drawing the indictment. However, he did insert an averment as to a scheme to 'obtain money and property under false pretenses' in the language of section 3894, but we think that a fair construction of this averment might be, that it was intended thereby to give a better description of the scheme to defraud, which was to be carried into effect by the use of the post office department, and a possible object may also have been to get the benefit of the last clause of section 3894, which gives jurisdiction either in Iowa, where the letter was mailed, or in Kentucky, where it was delivered.

In construing the statutes we have reached the conclusion that the first count can be based only on section 5480, and if this be correct, then the offense charged was committed in Iowa, and not in Kentucky. In Iowa the scheme to defraud was devised, and there the letter designed to effectuate it was placed in the post office. These things were all that were necessary to complete the offense under section 5480. It was not necessary to aver, nor would it be necessary to prove, that the letter was carried to or delivered in Kentucky. Depositing it in the mail completed the offense in Iowa." Record, pages 13 and 14.

In support of the holding in the Sauer case, that section 3894 only includes, by proper construction, lottery schemes, the court's attention is called to the following authorities:

In the case of *Horner vs. United States*, 143 U. S., page 570, (36-269), this question, determined by the Sauer case was presented, and the court says:

"It is contended for Horner that the circular set forth in the complaint, relating to the redemption of the Austrian government bonds, is not included in the prohibition of section 3894 of the revised statutes, as amended, and that he committed no offense by depositing such circular in the mail. But we are of opinion that that question ought not to be reviewed by us on this appeal. The point raised is that the Austrian bond scheme was not a lottery. That is a question properly triable by the court in which an indictment may be found against Horner. He is now held to await the action of a grand jury. His case is in the regular course of criminal adjudication. It is not proper for this court, on this appeal, nor was it proper for the Circuit Court, on the writ of habeas corpus, to determine the question as to whether the scheme was a lottery. *Oteiza y Cortes vs. Jacobus*, 136 U. S. 330 (34-464); *Stevens vs. Fuller*, 136 U. S. 468 (34-461). The commissioner had jurisdiction of the subject matter involved and of the person of Horner, and the grand jury would have like jurisdiction. The offense, if any, was committed within the Southern District of New York. Whether the scheme was a lottery is a question to be determined in the administration of the jurisdiction. It is not for this court to determine that question in advance. The principle is the same as that involved in *Re Fassett*, 142 U. S. 479, 483, 484 (35-1087). The case presents for the determination of the court in which the indictment may be found the question as to whether the scheme was a lottery, and it is not for any court to determine it in advance, on habeas corpus. If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus."

In *Nichols vs. State*, 26 N. E. 839, the court said:

"The rule is that, where words of a particular description in a statute are followed by general words that are not specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases of like kind as those designated by the particular words. *Bish. St. Crime*, sections 245, 246; *State vs. McCrum*, 38 Minn. 154, 36 N. W. Rep. 102; *Berg vs. Baldwin*, 34 Minn. 541, 18 N. W. Rep. 821; *Miller vs. State*, 121 Ind. 298, 23 N. E. Rep. 94."

In *Lewis' Sutherland Statutory Construction*, section 443, it is said:

"Statutes which are not inconsistent with one another, and which relate to the same subject matter, are in *pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times.' Acts in *pari materia* should be construed together and so as to harmonize and give effect to their various provisions. This is especially the case when the acts are passed at the same session. 'It is to be presumed that different acts passed at the same session of the legislature are imbued by the same spirit and actuated by the same policy and they should be construed each in the light of the other.' Statutes constituting a system should be so construed as to make that system consistent in all its parts and uniform in its operation. As said by the Supreme Court of Massachusetts: 'Where statutes are part of a general system relating to the same class of subjects, and rest upon the same reason, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish.'"

"A statute must be construed with reference to the whole system of which it forms a part. And statutes upon cognate subjects may be referred to, though not strictly in *pari materia*."

This, for many years, has been the settled doctrine of the Supreme Court. See

Alexander vs. Alexander, 5 Cranch. 1-7.

United States vs. Freeman, 3 Howard, 556-564.

Atkins vs. The Disintegrating Co., 18 Wallace, 272-301.

Cope vs. Cope, 137 U. S. 682-688.

Stockdale vs. The Insurance Companies, 20 Wallace, 323.

In United States vs. Garrettson, 42 Fed. 22, the court says:

"It is a general rule, in the construction of statutes, that general words preceded or followed by particular words in the same or a subsequent clause, are qualified and restrained by the particular words, or to state it somewhat differently, when general words follow, in a statute, words of particular and special meaning, if there be not a clear manifestation of a different legislative intent, they are construed as applicable to persons or things, or *cases of like kind*, as are designated by the particular words."

Also citing Bishop on Statutory Crimes, sections 245-246.

Chapman vs. Forsythe, 2 Howard 202.

Woolsey vs. Cade, 54 Alabama 385.

Amos vs. The State, 73 Alabama 501.

Bishop on Statutory Crimes (2d edition) sections 119, 193, 194, 218, 220, 227, says:

"Such statutes are to reach no further in meaning than their words. No person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused. Only those transactions are covered by them which are within both their spirit and their letter."

Sections 3894 and 5480 were enacted at the same time and must be read together, and it must be presumed that they will be harmonious; they cannot be so blended as to constitute an offense not contained in either, considered separately.

In the case of *United States vs. Sauer*, 88 Fed. Rep. 240, the court lays down the following proposition: that section 5480 is the general section covering the use of the mails for promoting schemes to defraud; that section 3894, notwithstanding this general language, is specific and designed to punish the use of the mails for promoting lottery schemes; and that under section 5480, the prosecution can be instituted only in the district where the fraudulent matter was placed in the post office. It was consequently held in this case that an indictment under 5480 in the district where the matter was received, was void; and that, an order could not be entered for the removal of the defendant to that district. The court dealt with the question whether the offense under 5480 was triable in the district where the matter was received. Note in the following excerpt from the opinion:

"The only question with which I shall have to deal is whether, upon reading the indictment and warrant shown as the ground of removal, it appears that the offense charged is triable in the eastern district of Pennsylvania. If the court there has no jurisdiction of the offense because it was not committed in that district, the order for removal cannot properly be made. There are found in the Revised Statutes of the United States two provisions relating to the general subject of the use of the postal facilities of the United States for the purpose of promoting fraudulent schemes. One of these provisions is found in Section 5480, which is framed for the purpose of constituting as a criminal

offense the placing or causing to be placed in the post office material which might be otherwise mailable, for the purpose of promoting a scheme previously concocted to defraud some person or persons. That was a statute of a general character. There was at the same time another (section 3894), which in substance was a provision against the use of the mails of the United States for the purpose of promoting 'lottery schemes,' generally so termed. A fundamental rule of construction requires us to give such an interpretation to each of these several provisions as shall give place for the other to have effect. As I said, section 5480 is a general statute. Section 3894 is a statute designed for the specific purpose of prohibiting the use of the mails for promoting lottery schemes. It is true that in section 3894 there is some general language, such as this: 'Or concerning schemes devised for the purpose of obtaining money or property under false pretenses.' Now, that language is general in its form; but, upon the application of two maxims, it is to be restricted in its application so as to apply to schemes of the character designated in that section (3894), because, if it were construed broadly and according to the wide import of its terms, without restriction, it would cover the subject matter of section 5480. This would be to violate the rule which I have adverted to, of so construing each part of the statutes as that every bearing upon a kindred subject may have its due effect. And it would also be in disregard of another maxim of construction, which is that, where general words are used in connection with particular words, the general words are to be restricted in their signification so as to include only others of the same class or character as those which are specifically designated in the section and particular language in which the general language is found."

This is the exact question which is presented here. The court says further:

"Now, it seems to me that—starting from the root of the matter, as we have done and considering, as

we must, that congress, when it made up this revision of the statutes, could not possibly have intended to make two distinct provisions in reference to the same subject matter, but must be supposed to have intended these several provisions to relate to the distinct classes within which the cases might be included, and taking up the amendments, and showing, as I think is clearly done, that each of the amendments is an amendment, and an amendment only, of the particular statute which in its caption and title it professes to be an amendment of—neither of these two branches becomes merged in the other, but that each one moves off separately, and has continued down to this time separate from the other.”

In the case of *McDaniel vs. United States*, 87 Fed., 324, by the Circuit of Appeals, fourth circuit, it is said:

“The statute (Rev. St. Par. 3894), as amended, creates the offenses of carrying on the lottery business by depositing or causing to be deposited in the mails, sending or causing to be sent or delivered, such matter by the use of the post office establishment.”

Note here that the court says: “the offenses of carrying on the lottery business.” It is in the plural, because the statute is aimed at all schemes in the nature of lotteries. It is lottery, “so-called gift, chance, or other similar enterprises,” etc.

Under these circumstances, what effect is to be given to the words, “or concerning schemes devised for the purpose of obtaining money or property under false pretenses” in section 3894? Are they to be construed as broadening the scope of this section and as making it overlap section 5480, or are they limited by the general scope of section 3894, and do they mean schemes of like character devised for the purpose of obtaining money or property under false

pretenses? The former construction would involve infinite confusion and inconsistencies; the latter construction obviates this and is supported by sound reason and authority.

If this court, however, should conclude that the words "or concerning schemes devised for the purpose of obtaining money or property under false pretenses," in section 3894, so broadens the scope of said section as to make it overlap section 5480, and include offenses, other than "lottery schemes," "so-called gift, chance or other similar enterprises," then it is submitted that this count one is bad—for the following reasons:

The scheme alleged to have been devised was, that the advertisements were to incite correspondence, and defendants were to answer such correspondence, making false representations as to said cattle, as to their weight, quality and freedom from disease, and that they were straight steers,

"And further intended then and there, by means of said letters, so, as aforesaid, sent to said persons unknown, to induce said persons unknown to come from their respective places of residence to Fairfield, Iowa, and then and there intended to falsely and fraudulently deceive said persons unknown, and each of them, and to induce said persons unknown, and each of them, to purchase cattle from them, the said George F. Stever and said J. B. Stever and Harry I. Ball, and to misrepresent to said persons unknown, and to each of them, the weight, quality and value of said cattle, and thereby to induce said persons, and each of them, to buy *quantities* of said cattle, the exact *quantities* whereof are to the grand jurors aforesaid, unknown; and to substitute other and different and inferior cattle for the cattle so, as aforesaid, sold to said persons unknown, and each of them, and to represent to said persons unknown, and each of them, that the cat-

tle so substituted, were the same cattle so, as aforesaid, bought by said persons unknown, and each of them, and thereby to deceive said persons, and each of them, and knowingly and fraudulently to obtain from said persons unknown and each of them, large sums of lawful money of the United States, the amounts whereof are to the grand jurors aforesaid unknown, and by and under and by means of said false pretenses as to the weight and quality and value and identity and freedom from disease of said cattle so, aforesaid intended to be sold to said persons unknown, and each of them."

These cattle were to be sold and bought, as the indictment states, "by the *quantity*," which evidently means by the head, or drove—and the letter copied, shows the same; but that if purchasers desired *by weight*, then, at an increased price—purchasers were to *inspect*, and then buy on their judgment; so far, no fraudulent scheme is shown, even if defendants did state incorrectly as to weight, they were but representing their property, as sellers do; the purchaser inspecting and acting on his own judgment. The fraud consisted in the act of the substitution alleged; and this ~~was~~^{was to take} place after the sale had been fully completed, which included the payment of the money for the good cattle, and by said act of substitution, Fowler Brothers were not ~~deprived~~^{to be} of "Money," but "Property;" defendants substituted their inferior steers for the good ones sold.

It is insisted that said count is bad, in charging "Money" instead of "Property." This count is also bad for duplicity, as it charges both *causing to be deposited for mailing*, and *causing to be delivered*, etc.

In *Bates vs. State*, (Supreme Court of Wisconsin, April 5, 1905) N. W. Rep., Vol. 103, page 251, it is said:

"In order to establish the crime of false pretenses defined by Rev. St. 1898, section 4423, the evidence must show the obtaining of the specific property alleged in the information, or some part of it, and an allegation of obtaining money is not satisfied by proof of obtaining evidences of money, indebtedness, or orders to pay money, or some other property."

In the case of United States vs. Conrad, 59 Fed. Rep., page 458, it is held that this statute 3894 contains three offenses:

"(1) Knowingly depositing or causing to be deposited such forbidden matter in the mails; (2) Sending such matter or causing it to be sent by mail; (3) Knowingly causing such matter to be delivered by mail."

This construction was approved in the case of Horner vs. United States, 44 Fed. Rep., 677, and 143 U. S., page 207. It was held in this case that as to the first two offenses, they were complete upon the depositing in the mail for transmission and that said transmission or delivery was not a necessary element in the offense, and it is here submitted that under the holding in the case of Brooks vs. Southern Pacific Company, 207 U. S., page 463, this entire section as to special jurisdiction is void as the *lawful* and *unlawful* matters are *interblended*.

It is true that this statute has been passed on heretofore by this court, but the question here, seems never to have been presented, or passed on.

SECOND COUNT.

The second count of this indictment is drawn under section 5440 of the Compiled Statutes of the United States, and is in part as follows:

"That on the twentieth day of April, in the year of our Lord One Thousand Nine Hundred and Eight, in the State of Iowa, said George F. Stever and said J. B. Stever and said Harry I. Ball feloniously did conspire, combine and confederate together with each other and with divers persons to the grand jurors aforesaid unknown, to commit an offense against the United States, to-wit, the offense of knowingly depositing and causing to be deposited in the mail of the United States at Fairfield, Iowa, and causing to be sent by said mail of the United States, to be conveyed and delivered by said mail of the United States at Colesburg, in the State of Kentucky, and in the Western District thereof, a certain letter concerning a certain scheme devised for the purpose of obtaining money under false pretenses, and of knowingly causing said letter to be delivered by mail of said United States at said Colesburg, to the persons to whom said letter was then and there addressed in the manner following."

The same letter of defendants to Fowler Brothers, copied in count one, is here copied.

This count two is based upon section 5440 of the United States Statutes, which is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

The count alleges that the conspiracy to violate the laws of the United States was entered into in the State of Iowa, and that one of the conspirators *then and there, viz,* at Fairfield, in that state, in order to carry the conspiracy into effect, deposited in the mails of the United States the letter described in the count. It cannot be doubted that these averments show that the offense was completed in Iowa, and consequently this court cannot have jurisdiction of it here.

In *Stokes vs. United States*, 157 U. S., 187, the indictment is for *conspiracy*, section 5440, to commit an offense described in section 5480, as amended; and the court in that case said, that to carry out such a scheme, "*such persons must have either deposited a letter or package in the post office or taken or received one therefrom.*" In the case at bar, the letter was deposited in the post office at Fairfield, Iowa, and this completed the offense there, under section 5480; and it is alleged that the conspiracy was there formed; it is also alleged that defendants caused the letter to be *delivered* in Kentucky, in the Western District thereof, to said Fowler Brothers, but a *delivery* is not an offense under section 5480, and cannot constitute an "Overt Act," in this conspiracy, because the *depositing the letter in the post office in the State of Iowa completed there said "Overt Act,"* charged; and the *delivery* of said letter in Kentucky to Fowler Brothers, did not even tend, in any way whatever, to effect the object of said conspiracy.

See *United States vs. Britton*, 108 U. S., 200.

Neither section 5480 or section 5440, give jurisdiction to districts other than where the offenses are committed—completed.

In the case of Armour Packing Company vs. United States, 209 U. S., 56, the statute does not give jurisdiction to any district except where the offense is completed, but makes a complete offense in every district *through which the shipment passes*; that congress has a right to do this, is not questioned; but it is earnestly contended that as under section 731—where an act undertakes to give jurisdiction to districts other than the one where the offense is completed, it is unconstitutional, and these cases cited bear out said contention. The Elkins Act makes a separate offense in every district through which the shipment passes, section 731 makes *the same completed act*, an offense in all districts where any part of it was done.

The case of Putnam vs. United States, 163 U. S. 1118—holds that the jurisdiction is where the offense is completed.

See also,

United States vs. Fowkes, 53 F. R., 13.

United States vs. Conrad, 59 F. R., 458.

Horner vs. United States, 143 U. S., 570 (36-126-226).

Davis vs. United States, 104 F. R., 136.

Stokes vs. United States, 157 U. S., 186.

United States vs. Belknap, 96 F. R., 614.

Palliser vs. United States, 36 U. S., 256 (34-514).

Ball vs. United States, 140 U. S., 344 (34-384).

Burton vs. United States, 202 U. S., 344 (50-1057).

W. M. SMITH,

Attorney for Defendants in Error.

LEGGETT & McKEENEY,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

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|---|------------|
| THE UNITED STATES, PLAINTIFF IN ERROR, | } No. 448. |
| v. | |
| GEORGE F. STEVER, J. B. STEVER, AND Harry I. Ball. | |

*IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF KENTUCKY.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is a writ of error, under the criminal appeals act, to review a judgment of the District Court of the United States for the Western District of Kentucky, sustaining the demurrer of the defendants to an indictment charging a violation of, and a conspiracy to violate, a statute of the United States (Section 3894, Revised Statutes), the judgment being based upon a construction of the statutes upon which the indictment was founded.

The first count of the indictment (R., 2-5) charges that the defendants had, prior to April 20, 1908, "devised a certain scheme for the purpose of obtaining

sums of money * * * by and under false pretenses" from divers persons, among others parties residing at Colesburg, Kentucky, within the jurisdiction of the court, to be effected by means of the Post-Office Establishment of the United States by opening correspondence with said persons; that the scheme was to be effected by inserting in certain papers offers to sell high-grade cattle, and thereby inducing the readers of the offers to open correspondence with them; that the defendants were then, through the United States mail, to make false and fraudulent representations as to the character of the cattle they intended to dispose of, and to induce their victims to come and inspect the cattle at Fairfield, Iowa, and after the cattle had been inspected by the victims to substitute inferior cattle in their place; that the defendants succeeded in opening up correspondence with certain persons at Colesburg, Kentucky, and in furtherance of said scheme, "devised for the purpose of obtaining money under false pretenses," unlawfully did knowingly and fraudulently cause "a certain letter to be conveyed and delivered by said mail of the United States at Colesburg, in the State of Kentucky," to one of the victims of their scheme. The letter, which is of a character to accomplish the scheme, is set forth in the indictment.

The second count (R., 5-9) charges a conspiracy to commit the offense charged in the first count.

The defendants demurred to the indictment (R., 10), and the court, in a written opinion, sustained the demurrer and quashed the indictment (R., 12-15).

Thereupon this writ of error was sued out by the United States.

STATUTES.

Section 3894 of the United States Revised Statutes, as amended by the act of September 19, 1890, c. 908 (26 Stat., 465), provides:

SEC. 3894. No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post office or branch thereof, or by any letter carrier; nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter carrier. *Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly*

cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

Section 5480 of the United States Revised Statutes, as amended by the act of March 2, 1889, chapter 393 (25 Stat., 873), provides:

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending

to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the post-office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post office, branch post office, or street or hotel letter box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

QUESTIONS PRESENTED.

In sustaining the demurrer to the first count of the indictment, the District Court felt constrained to follow the decision of the District Court for the Western District of Michigan in *United States v. Sauer* (88 Fed., 249), that section 3894, Revised Statutes, only referred to lotteries and lottery schemes. The court also concluded that if the first count was based upon section 5480, the offense charged was committed in Iowa.

The District Court also said that if the first count were susceptible of being regarded as based upon both sections 3894 and 5480, it would be bad for duplicity.

The second count was held insufficient because not charging the commission of an offense in the Western District of Kentucky.

Upon this writ of error the Government seeks only to have reviewed the correctness of the court's ruling as to the scope of section 3894, and the validity of the first count. The assignments of error (R., 16) are broader, and cover its construction of other statutes, but the Government will not press them beyond the point stated. It concedes that the ruling of the District Court as to the validity of the second count was correct from any point of view, as that count in terms charges that the conspiracy was committed in the State of Iowa, and it is not perceived how, even assuming that the conspiracy was to violate section 3894, and an overt act in furtherance of the object of the conspiracy was committed in the Western

District of Kentucky, such facts would give the court jurisdiction, since the overt act is no part of the conspiracy.

ARGUMENT.

I.

Section 3894 of the Revised Statutes is not limited either in its terms or by necessary implication to lottery schemes.

Section 3894, as amended by the act of September 19, 1890, provides:

SEC. 3894. No letter, postal card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, *or concerning schemes devised for the purpose of obtaining money or property under false pretenses*, * * * shall be carried in the mail or delivered at or through any post office * * *. Any person * * * who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail shall be deemed guilty of a misdemeanor.

It will be observed that the clause "*or concerning schemes devised for the purpose of obtaining money or property under false pretenses*" is grammatically completely separated from, and has no necessary relation to, the preceding clause, "*concerning any lottery, so-called gift concert, or other similar enterprise,*" etc. The statute on its face indicates that Congress was prohibiting the carriage in the mail and the delivery through the post office of two distinct classes of matter. The first class, "*concerning*

any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance," is so comprehensively described as to render meaningless as applied to such enterprises the clause "*or concerning schemes devised for the purpose of obtaining money or property under false pretenses.*" Having prohibited the carriage in the mail of matter "*concerning any lottery, so-called gift concert, or other similar enterprise,*" it necessarily excluded all matter concerning schemes in the form of a lottery devised for the purpose of obtaining money or property under false pretenses. Unless, therefore, we take the words "*or concerning schemes devised for the purpose of obtaining money or property under false pretenses*" in their natural and unlimited sense, they serve no purpose in the statute.

The view that the clause in question must be confined to lottery schemes rests entirely upon the fact that section 5480 of the Revised Statutes covers generally the subject of schemes or artifices to defraud. Even if the two sections were identical in their scope, we do not see how either is to be disregarded or misconstrued on that account. A comparison of them, however, will show that they do not cover exactly the same field. The prohibition in section 3894 is of the *carriage in the mails and the delivery through the post office* of matter concerning a peculiar class of frauds, to-wit, "*schemes devised for the purpose of obtaining money or property under false pretenses.*" Section 5480 is intended primarily to reach any person who "*having devised or intending to devise any scheme or artifice to defraud,*"

etc., uses the mails in furtherance of such scheme. The prohibition in section 3894 extends to anyone, whether he had devised the scheme to defraud or not, or whether he was connected with the postal service or not. Section 5480 is confined to the punishment of devisers of a scheme or artifice to defraud. Hence, section 5480 merely penalizes the depositing of any such letters in the mail, or the taking of the same therefrom by the devisers of the scheme or artifice, while section 3894 prohibits the depositing, the carriage, and the delivery through the mails of letters of the character therein described by anybody whatsoever.

In this connection it will be observed that there is a manifest difference between schemes to obtain money by false pretenses and schemes to defraud generally. (*Durland v. United States*, 161 U. S., 306, 312, 313; *Jackson v. The People*, 126 Ill., 139, 149.) Obtaining money by false pretenses was an offense at common law; to defraud was not necessarily so. (*State v. Hewett*, 31 Me., 396.) It was not strange, therefore, that Congress dealt with the common-law offense in a separate statute.

In *Public Clearing House v. Coyne* (194 U. S., 497) this court had before it the construction of section 3929 of the Revised Statutes, as amended by the act of September 19, 1890 (26 Stat., 466), which provides:

SEC. 3929. The Postmaster General may, upon evidence satisfactory to him that any person or company is engaged in conducting any lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal

property by lot, chance, or drawing of any kind, or that any person or company is conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any post office at which registered letters arrive directed to any such person or company * * * to return all such registered letters to the postmaster at the office at which they were originally mailed. * * *

Concerning the scope of this statute, the court says that it applied (*ib.*, p. 505)—

to two classes of cases: First, to schemes for the distribution of money, etc., by lot, chance or drawing of any kind; second, to all schemes or devices for obtaining money or property of any kind by means of false or fraudulent pretenses, representations or promises.

The similarity of the language of section 3929 to section 3894 will be noted. It will be observed, however, that in section 3929 there are not only general words following particular words, but the word "other," which ordinarily indicates similarity, is used in connection with the general words; and yet, despite this fact, this court recognized that the general words were to be given their full force and effect and were in nowise limited by the particular words which preceded them. In section 3894 the word "schemes" is not limited or qualified by the word "other" or any other word denoting similarity.

In *United States v. Sears Roebuck & Company*, decided February 23, 1909, apparently not reported,

the District Court for the Southern District of Iowa construed section 3894 according to its plain import. Replying to the contention that the indictment in that case "covers all the requirements of section 5480 of the Revised Statutes, under which most indictments to further fraudulent schemes are based," that court said:

The importance of this is not only great, but it is jurisdictional. This is so because under section 5480 an indictment can only be returned and the case prosecuted in the judicial district where the matter to further the fraud is deposited in the post office. And as those fraudulent catalogues were deposited only in the Chicago post office, a prosecution can not be carried on under section 5480.

But under section 3894 a prosecution can be carried on in the district where deposited in the post office or in any district through which it is carried, or in the district in which is located the post office that delivered the fraudulent matter to the addressee. *The question is not whether the indictment covers section 5480, but does it cover section 3894. This court holds it does. It is of frequent occurrence that one act makes two or more crimes, and the prosecutor has his election under which statute he will proceed.*

It is contended, therefore, that there is no principle of statutory construction which justified the lower court in disregarding the plain meaning of the clause in question and confining it to schemes by way of a lottery to obtain money by false pretenses.

II.

The legislative history of section 3894 supports the contention of the Government as to the meaning of the provision in question.

The first provision as to lotteries appears to be contained in the act of July 27, 1868 (15 Stat., 194, 196), section 13 of which read in full as follows:

SEC. 13. And be it further enacted, that it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever.

On June 8, 1872, Congress passed "An act to revise, consolidate, and amend the statutes relating to the Post Office Department." Section 149 of that act (17 Stat., 302) provided:

SEC. 149. That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning *illegal* lotteries, so-called gift-concerts, or other similar enterprises offering prizes, *or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses*, and a penalty of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction, in any Federal court, of the violation of this section.

The insertion of the word "illegal" and of the clause "or concerning schemes devised and intended to deceive and defraud the public for the purpose of

obtaining money under false pretenses" indicate that at the time of this revision Congress was concerned primarily with the use of the mails for unlawful purposes, dealing here with *illegal* lotteries, etc., and schemes to obtain money by false pretenses, which, as above stated, were unlawful at common law. In other words, fraud and illegality, rather than the subject of lotteries, was uppermost in the mind of Congress at the time of this revision; therefore, the clause concerning schemes to obtain money by false pretenses could not have been intended to be limited to lottery schemes.

Later on in the same revision (sections 300 and 301 of the act of 1872) Congress dealt further with the same general subjects, those sections becoming, respectively, sections 3929 and 5480 of the Revised Statutes. As above pointed out, this court, in *Public Clearing House v. Coyne* (194 U. S., 505), held that section 3929, which, like section 3894, refers to both lottery schemes and schemes to defraud, covered two distinct subject matters.

An analysis of the several statutes referred to, either as they appear in the act of 1872 (sections 149, 300, and 301) or in the Revised Statutes (sections 3894, 3929, and 5480), shows that each has its distinct purpose to perform. Section 149 of the act of 1872 (sec. 3894, R. S.) is intended primarily to prevent the *conveyance* in the mail of letters concerning lotteries or schemes to obtain money by false pretenses; section 300 (3929, R. S.) authorizes the Postmaster General to return registered letters concerning any

fraudulent lottery or scheme to obtain money through the mails by false pretenses; while section 301 (section 5480, R. S.) was designed to punish the originators of all schemes to defraud who used the mails in furtherance of their purposes.

Any possible doubt as to the intention of Congress not to limit the clause in section 3894 referring to schemes to obtain money by false pretenses to lotteries would seem to be removed by its action in the revision of the law made by the Criminal Code (35 Stat., 1088). In that code the phrase is taken out of what was originally and now is exclusively the lottery statute and placed in the statute relating to schemes to defraud. The sections referred to now constitute sections 213 and 215 of the Code. The latter section reads:

SEC. 215. Whoever, having devised or intended to devise any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises* * * * shall, for the purpose of executing such scheme or artifice * * * place * * * any letter * * * in any post office * * * of the United States * * * or shall knowingly cause to be delivered by mail according to the direction thereon * * * any such letter * * * shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both.

It will be observed that Congress not only transferred the provision as to obtaining money under

false pretenses from the lottery section to the fraud section, but also the provision making it a crime by making the delivery of a letter of that character an offense. The result is, no substantial change in the law, but a reassembling of the provisions relating to schemes to defraud in a more suitable manner. It shows conclusively that, in the mind of Congress, it was important to cover specifically the offense of obtaining money by false pretenses through the use of the mails.

It is respectfully submitted that the judgment of the Circuit Court, sustaining the demurrer to the first count of the indictment, should be reversed.

WILLIAM R. HARR,
Assistant Attorney General. ➤

OCTOBER, 1911.



UNITED STATES *v.* STEVER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF KENTUCKY.

No. 448. Argued October 20, 1911.—Decided December 4, 1911.

Congress will not be supposed to make the same offense indictable and punishable under either of two distinct provisions under which the procedure and the penalties are different.

Where general words follow words descriptive of particular actions they should, unless clearly manifested to the contrary, be construed as applicable to cases or matters of like kind with those described by the particular words.

Sections 3894 and 5480, Rev. Stat., each apply to different offenses and are to be construed as legislation *in pari materia*.

Section 3894, Rev. Stat., relates particularly to lottery schemes, and the general words "concerning schemes devised for the purpose of obtaining money or property by false pretenses" are limited to schemes having a similitude to lotteries and other like schemes particularly described and do not extend to the general schemes to defraud covered by § 5480, Rev. Stat.

THE facts, which involve the¹ construction of §§ 3894 and 5480, Rev. Stat., and what constitute offenses thereunder, are stated in the opinion.

Mr. Assistant Attorney General Harr for the United States:

Upon this writ of error the Government seeks only to have reviewed the correctness of the court's ruling as to the scope of § 3894, and the validity of the first count. Section 3894 is not limited either in its terms or by necessary implication to lottery schemes.

The clause "or concerning schemes devised for the purpose of obtaining money or property under false pretenses" is grammatically completely separated from, and has no necessary relation to, the preceding clause, "concerning any lottery, so-called gift concert, or other similar enterprise," etc. The statute on its face indicates that Congress was prohibiting the carriage in the mail and the delivery through the post office of two distinct classes of matter.

The prohibition in § 3894 is of the carriage in the mails and the delivery through the post office of matter concerning a peculiar class of frauds, to wit, "schemes devised for the purpose of obtaining money or property under false pretenses." Section 5480 is intended primarily to reach any person who "having devised or intending to devise any scheme of artifice to defraud," etc., uses the mails in furtherance of such scheme. The prohibition in § 3894 extends to anyone, whether he had devised the scheme to defraud or not, or whether he was connected with the postal service or not. Section 5480 is confined to the punishment of devisers of a scheme or artifice to defraud.

Mr. W. M. Smith and *Mr. J. S. McKenney* for defendants in error:

Section 3894, Rev. Stat., only includes, by proper construction, lottery schemes. *United States v. Sauer*, 88 Fed. Rep. 249; *Horner v. United States*, 143 U. S. 570; *Nichols v. State*, 26 N. E. Rep. 839.

Where words of a particular description in a statute are

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followed by general words that are not specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases of like kind as those designated by the particular words. *Lewis' Sutherland Stat. Const.*, § 443; *Alexander v. Alexander*, 5 Cranch, 1, 7; *United States v. Freeman*, 3 How. 556-564; *Atkins v. Disintegrating Co.*, 18 Wall. 272, 301; *Cope v. Cope*, 137 U. S. 682-688; *Stockdale v. Insurance Co.*, 20 Wall. 323; *United States v. Garrettson*, 42 Fed. Rep. 22; Bishop on Statutory Crimes, § 246 *et seq.*; *Chapman v. Forsythe*, 2 How. 202; *Woolsey v. Cade*, 54 Alabama, 385; *Amos v. The State*, 73 Alabama, 501; Bishop on Statutory Crimes (2d ed.), §§ 119, 193, 194, 218, 220, 227.

Sections 3894 and 5480 were enacted at the same time and must be read together, and it must be presumed that they will be harmonious; they cannot be so blended as to constitute an offense not contained in either, considered separately. *United States v. Sauer*, 88 Fed. Rep. 240; *McDaniel v. United States*, 87 Fed. Rep. 324.

The count is bad, in charging "Money" instead of "Property." This count is also bad for duplicity, as it charges both causing to be deposited for mailing, and causing to be delivered, etc. *Bates v. State*, 124 Wisconsin, 612; *United States v. Conrad*, 59 Fed. Rep. 458; *Horner v. United States*, 44 Fed. Rep. 677; S. C., 143 U. S. 207.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a writ of error to review a judgment quashing an indictment as not stating an offense triable in the Western District of Kentucky. The indictment contained two counts. The first is drawn to bring the offense within § 3894, Revised Statutes, as amended, and the second is based upon § 5480, Revised Statutes, and is for a conspir-

acy to commit the offense charged in the first count. The Government now concedes that the latter count states no offense within the Western District of Kentucky and withdraws the assignments of error relating to the judgment quashing it.

The count to be considered charges, in substance, that the defendants, on April 20, 1908, in the State of Iowa, devised a certain scheme for the purpose of obtaining money, etc., "by and under false pretenses," from various persons, among others, certain persons named, residing at Colesburg, within the jurisdiction of the court, to be effected by means of the United States mail through correspondence with them. The scheme, summarily stated, was to be effected by inducing persons, who should read their advertisements offering high grade cattle for sale, to open correspondence with them. That then the defendants were, through the mail, to make false and fraudulent representations as to the character of the cattle they offered for sale, and thereby induce such correspondents to come and inspect the cattle at Fairfield, Iowa, and that after a sale of cattle so inspected, were to substitute inferior cattle in the place of those inspected and sold. It is then averred that the defendants succeeded in opening up correspondence with certain persons at Colesburg, Kentucky, and that in furtherance of said scheme and for the purpose of obtaining money under false pretenses they, the defendants, on April 20, 1908, "unlawfully did knowingly and fraudulently deposit and cause to be deposited in the mail . . . at Fairfield, Iowa, and did then and there knowingly cause to be sent by said mail of the United States a certain letter to be conveyed and delivered by said mail of the United States at Colesburg, in the State of Kentucky, and in the western district thereof," to be delivered to persons there addressed and residing, which letter was calculated to accomplish the scheme intended, and which said letter the defendants are charged

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as "having caused to be delivered by mail to the person addressed."

For convenience we set out in the margin §§ 3894 and 5480, Revised Statutes, as amended.¹

¹ SEC. 3894. No letter, postal-card, or circular concerning any lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note, or money-order for the purchase of any ticket, tickets, or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any post-office or branch thereof, or by any letter carrier, nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier. Any person who shall knowingly deposit or cause to be deposited, or who shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail anything herein forbidden to be carried by mail, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment for each offense. Any person violating any of the provisions of this section may be proceeded against by information or indictment and tried and punished, either in the district at which the unlawful publication was mailed or to which it is carried by mail for delivery according to the direction thereon, or at which it is caused to be delivered by mail to the person to whom it is addressed.

SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through cor-

The last clause of § 3894 provides that an offense against any of the provisions of the section "may be proceeded against . . . either in the district at which the unlawful publication was mailed, or to which it is carried by mail for delivery according to the direction thereon, *or at which it is caused to be delivered by mail to the person to whom it is addressed.*"

The claim is that an indictment lies in the Western District of Kentucky, because that is the district in which the defendants caused the letter mentioned "to be delivered by mail" to the person addressed.

The Government has suggested that there is a distinction at common law between a false pretense and an in-

respondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside of the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so misusing the post-office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

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dictable cheat or fraud. It may be conceded that at the common law a false pretense is not a promise, but a fraudulent and false representation of an existing or past fact, designed to induce one to part with money or goods. Bishop on Criminal Law, 6th ed., §§ 415, 419, and cases, English and American, there cited.

Whether the facts averred in this count constitute a scheme to obtain goods or money by a common-law false pretense may admit of grave doubt. But whether that be so or not, it would require very subtle distinction to conceive of a use of the mail to promote a scheme to obtain property or money by means of false pretenses which would not also be a "scheme or artifice to defraud" within the plain meaning of § 5480. For the purpose of the present discussion it is not important whether the pleader has characterized the scheme described as a false pretense or as "a scheme or artifice to defraud," since in either case a use of the mail prohibited by § 5480 is shown. That section was construed by this court, in *Durland v. United States*, 161 U. S. 306, 313, as "including everything designed to defraud by representations as to the past or present or suggestions and promises as to the future."

If, then, this indictment is also maintainable under § 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a scheme to defraud indictable and punishable under either of two distinct provisions, and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments. Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of pun-

ishment under one not possible under the other. Thus, under § 3894 an indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under § 5480. Under section 3894, one may be imprisoned not longer than one year, while under the other he may be imprisoned for eighteen months. Under § 3894, he is subject to indictment for any number of violations. Under the other the indictment may only charge offenses to the number of three committed within the same six calendar months.

No such purpose can be fairly said to have actuated Congress. The two sections are intended to prevent the use of the mail for certain purposes. The one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance. The other is intended to prohibit the use of the mail to carry on schemes of general fraud, the language being "any scheme or artifice to defraud." A scheme to defraud by means of false pretenses is, as we have seen, "a scheme or artifice to defraud," within the plain meaning and purpose of this section. The general words, "or concerning schemes devised for the purpose of obtaining money or property under false pretenses," found in § 3894, do not harmonize with the general purpose of that section, if construed as urged by the learned Attorney General. So construed, they would trench upon the ground covered by § 5480. The words referred to follow particular words descriptive of schemes of gain dependent upon chance, and are followed by further particular words relating to the same kind of lottery schemes.

In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words.

Construing the two sections together as legislation in

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pari materia, we find no manifest legislative intent forbidding the application of the rule of construction referred to. We therefore conclude that the words "or concerning schemes devised for the purpose of obtaining money or property by false pretenses," are to be limited to schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section. This view finds strong support in the case of *United States v. Sauer*, 88 Fed. Rep. 249, where the opinion was by Judge Severens, then District Judge.

The judgment of the court below is accordingly

Affirmed.